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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR HERRERA, JR.,

Defendant and Appellant.

F071734

(Super. Ct. No. F11904383)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Poochigian, Acting P.J., Detjen, J. and Franson, J.

On December 14, 2011, Herrera pled no contest in this matter to 10 felony counts and admitted five prior prison term enhancements (Pen. Code, § 667.5, subd. (b))<sup>1</sup> and five prior conviction enhancements (Health & Saf. Code, § 11370.2). When it originally sentenced Herrera to a 10-year, aggregate term, the court imposed three of the five prior prison term enhancements and one of the five prior conviction enhancements and it struck the enhancements it did not impose. The court, however, did not specify which enhancements it imposed and which ones it struck.

On March 10, 2015, the court granted Herrera's petition for resentencing pursuant to section 1170.18 and reduced four of his felony convictions to misdemeanors. The court, however, did not resentence Herrera because it originally imposed concurrent terms on these counts and the reduction of these counts to misdemeanors did not affect his sentence.

On appeal, Herrera contends the court erred when it granted his petition for resentencing because it did not identify which three of the five prior prison term enhancements (§ 667.5, subd. (b)) and which one of the five prior conviction enhancements (Health & Saf. Code, § 11370.2) it actually imposed. We affirm.

### **FACTS**

On September 21, 2011, the Fresno County District Attorney filed a second amended complaint charging Herrera with transportation for sale of methamphetamine (count 1/ Health & Saf. Code, § 11379, subd. (a)), possession for sale of methamphetamine (counts 2 & 6/ Health & Saf. Code, § 11378), receiving stolen property (counts 3, 4, 8 & 9/§ 496, subd. (a)), identity theft with a prior conviction (count 5 & 10/ § 530.5, subd. (c)(2)), and possession of PCP (count 7/ Health & Saf.

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<sup>1</sup> Unless otherwise indicated, all other further statutory citations are to the Penal Code.

Code, § 11377, subd. (a)). The complaint also alleged five prior conviction enhancements and five prior prison term enhancements.

On December 14, 2011, Herrera pled no contest to the ten counts and admitted the prior conviction and prior prison term enhancements in exchange for an indication by the court that he would receive a 10-year local term.<sup>2</sup>

On January 30, 2012, the court sentenced Herrera, pursuant to its indicated sentence, to an aggregate 10-year local term as follows: the aggravated term of four years on count 1, a stayed term on count 2, concurrent three-year terms on each of the eight remaining counts, a three-year prior conviction enhancement, and three prior prison term enhancements. The court struck the enhancements it did not impose. The court, however, did not specify which one of the five prior conviction enhancements or which three of the prior prison term enhancements it imposed and which ones it struck.

On November 19, 2014, Herrera filed a petition for resentencing pursuant to section 1170.18.

On March 10, 2015, the court granted Herrera's petition as to counts 3, 4, 7, and 8, and reduced the offenses in those four counts to misdemeanors. The court also found that the reduction did not affect the 10-year term originally imposed because the terms imposed on the reduced counts "had run concurrent." The court then continued the matter in order to address any "credit issues" that remained.

On April 9, 2015, the court determined that Herrera was entitled to an additional 120 days of actual custody credit and awarded him 1,476 days of actual custody credit and 1,475 days of conduct credit for a total of 2,951 days of credit. Additionally, defense

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<sup>2</sup> Although Herrera refers to the 10-year term as a lid, the court was very clear during pre-plea discussions that it would impose a 10-year term, although it might sentence him to the whole ten years in local custody or split this term to five years in local custody and five years on mandatory supervision. Additionally, the court estimated that the maximum sentence he could receive based on his plea was 33 years.

counsel asked the court to resentence Herrera on the other counts in light of the modification of four convictions but the court refused, noting that section 1170.18 allowed it to modify and reduce only certain charges.

### **DISCUSSION**

Herrera contends the court erred by its failure to identify the prior conviction and prior prison term enhancements it actually imposed when it granted his petition for resentencing. According to Herrera, the abstract of judgment should be corrected to ensure that the sentencing transcript and the abstract of judgment reflect the proper and legal sentence. He contends his appeal of this issue is timely because it is an appeal from a Proposition 47 resentencing in which the trial court refused to do a “global” resentencing. According to Herrera, the court’s refusal to do a complete resentencing after it granted his petition for resentencing prevented him from raising the possibility of striking the prior prison term enhancements actually imposed if they were based on a conviction that was reduced to a misdemeanor. (However, cf. *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1077-1079 [Proposition 47 does not prohibit the imposition of prior prison term enhancements based on felony convictions that were subsequently designated as misdemeanors pursuant to its provisions].) We will reject these contentions.

“Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377.” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

“Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be ‘resentenced to a misdemeanor ... [on the affected convictions] unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ ” (*Id.* at p. 1092.)

At Herrera’s original sentencing hearing on December 14, 2011, the trial court failed to identify the three prior prison term enhancements and the prior conviction enhancement it actually imposed. Herrera’s challenge in the instant appeal to the court’s failure to do so is untimely because an appeal must be filed within 60 days of the order being appealed. (Cal Rules of Court, rule 8.308(a).)

The trial court’s modification of Herrera’s sentence pursuant to Proposition 47 does not assist Herrera in raising this issue because Proposition 47 does not explicitly provide that trial court can resentence a person on sentence components that are not affected by its provisions. Nor has Herrera cited any authority that permits the court to completely resentence a defendant when it reduces any of the defendant’s convictions pursuant to section 1170.18. Thus, we conclude that the issue Herrera raises is not cognizable in the instant appeal.

“ ‘[Moreover,] [w]here defendants have pleaded guilty in return for a *specified sentence*, appellate courts are not inclined to find error even though the trial court acts in excess of jurisdiction in reaching that figure, as long as the court does not lack *fundamental jurisdiction*.... The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to ‘trifle with the courts’ by attempting to better the bargain through the appellate process.’ [Citation.] ‘Where a court is merely acting in excess of its jurisdiction, the defendant who agrees

to such actions may be estopped later from challenging the court's actions on jurisdictional grounds.' ” (*People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-1057, accord *People v. Hester* (2000) 22 Cal.4th 290, 295.) “In its fundamental sense, ‘jurisdiction’ refers to a court's power over persons and subject matter.” (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 4.)

Herrera entered his plea for a specific sentence pursuant to the trial court's indicated sentence. The indicated sentence provided Herrera with a substantial benefit because it limited to only 10 years the sentence that would be imposed for the numerous offenses and enhancements he pled to. Since the court had fundamental jurisdiction over Herrera by virtue of the charges against him, at most it acted only in excess of its jurisdiction in imposing several enhancements without identifying which of the enhancements Herrera admitted it actually imposed. Thus, even if Herrera's contention were properly before us, we would conclude he is estopped from challenging his sentence.

#### **DISPOSITION**

The order granting Herrera's petition for resentencing pursuant to section 1170.18 is affirmed.